

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

ACE ELECTRIC AND PLUMBING,
INC., AND SHADE TREE ELECTRIC
OF ARKANSAS, INC., A SINGLE
EMPLOYER

and

CASE 16-CA-22807

PLUMBERS LOCAL UNION NO. 68,
AFL-CIO a/w UNITED ASSOCIATION
OF JOURNEYMAN AND APPRENTICES
OF THE PLUMBING AND PIPEFITTING
INDUSTRY OF THE U.S. AND CANADA,
AFL-CIO

Tamara J. Gant, Esq.,
for the General Counsel.
Eugene Vanover, pro se,
for the Respondent.
Patrick M. Flynn, Esq.,
for the Charging Party.

DECISION

Statement of the Case

LAWRENCE W. CULLEN, Administrative Law Judge: This case was heard before me on July 31, 2003, in Houston, Texas. The complaint in this case was issued by the Regional Director of Region 16 of the National Labor Relations Board (“the Board”). The complaint as amended at the hearing is based on a first amended charge filed by Plumbers Local Union No. 68, AFL-CIO a/w United Association of Journeyman and Apprentices of the Plumbing and Pipefitting Industry of the U.S. and Canada, AFL-CIO (“the Charging Party” or “the Union”) on June 23, 2003. The complaint alleges that Ace Electric and Plumbing, Inc., and Shade Tree Electric of Arkansas, (“the Respondent” or “the Company”) are a single employer, and have violated Section 8(a)(5) and (1) of the National Labor Relations Board Act. (“the Act”) by refusing to bargain collectively with the Union as the exclusive bargaining representative of its employees.

Based on the testimony and exhibits received in evidence and upon consideration of the memorandum filed by the General Counsel and the statement filed by Respondent and the record as a whole, I make the following Findings of Fact and Conclusions of Law:

I. Jurisdiction

The complaint alleges, the Respondent admits in part and I find based on the record that the Respondent is a single employer and a Texas corporation engaged in the business of providing plumbing services for new commercial construction and is an employer within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization

The complaint alleges, Respondent denies and I find based on the record that the Union is a labor organization within the meaning of Section 2(5) of the Act.

The Appropriate Unit

The complaint alleges and I find based on the record in this case that the plumbers and helpers who perform the various listed job functions constitute a unit appropriate for bargaining within the meaning of Section 9(b) of the Act.

Water mains, fire hydrants, water services, water meters, water filters, water softeners, hot and cold water plumbing fixtures, hot and cold and circulating water to swimming pools, ornamental pools, aquariums, fountains, baptisteries, ice water and cold water lines to drinking fountains, water to and from cellar drainers, surge tanks, house tanks, roof tanks, storage tanks, house pumps, including setting of such tanks and pumps; building fire lines not part of automatic sprinkler system; all pumps, valves, hose cabinets in connection with building fire protection lines, including wetting of such pumps, valves, hose cabinets, etc.; hot and cold water sterilizers, steam tables, coffee urns, all hot and cold water lines to all food cooking equipment in residences, cafes, restaurants, hotels, bakeries, food-canning plants, and other establishments where culinary equipment is used; all water lines of every description in testing and experimental laboratories; water piping of every description in filling stations and garages; the installation of all lawn sprinkler heads or field irrigation piping including valves, fittings and sprinkler heads; all water lines and solution lines in washaterias, cleaning plants and laundries.

Sewage, Waste, and Drain Lines. Installations of sanitary sewer from building to property line of public street or alley, regardless of material composing pipe used in such installation of such

sanitary sewer; all soil and waste lines from all plumbing fixtures; regardless of material used in manufacture of piping employed in installation of such soil and waste lines; drain lines from swimming pools, reflector pools, aquariums, baptisteries, water filters, water softeners, boiler blow-off tanks, steam tables, grease traps, garage doors wash rack traps, sumps of every description whether for sewage or waste water and any pumps in connection with such sump discharge; all catch basins for storm water or waste water as in yard and court drainage, parking lots, athletic fields, laundries, stables, etc.; all down spout lines to street or alley, setting of all down-spout boots, box, etc.; installation of sub-soil drainage lines around buildings, in basements, under cinder paths, etc.

Vents and Heating. All vents lines serving plumbing fixtures or the sanitary system in all public or private buildings shall be installed by the plumber as well as vent lines from sumps, oil and fuel tanks in service stations and garages, airports, etc.

Air Lines. All air piping in filling stations and garages, and all air lines for operating clocks, dental equipment, of barber shop equipment, all air lines for cleanup purposes; all air lines in experimental or testing laboratories; all temporary air piping for riveting, drilling, testing, etc.

Gas. Gas lines to cook stoves and ranges, to bakery ovens to gas-fired unit heaters of output rating of 300,000 b.y.u.'s or less, gas to water heating boilers for laundries, washaterias, restaurants, hotels, hospitals, creameries, milk-processing plants, ice cream plants, food-canning plants, and gas for heating water for all domestic purposes, as well as gas for room heaters, gas-fired steam radiators, all gases in experimental and testing laboratories, all gas for direct comfort heating.

Miscellaneous. All sheet lead lining for x-ray rooms, for baptisteries, for fountains, swimming pools, shower rooms or stalls, for tanks or vats for all purposes, and for roof flashings in connection with the plumbing and pipe fitting industry.

All block tin coils and carbonic gas piping for soda fountains, bars, etc.

Railing work and racks made of pipe, where screwed.

All piping of every description in sewage treatment plants, except steam piping and temperature control piping.

The installation of toilet room accessories, where not built into the wall, robe hooks, towel bars, paper holders, grab bars, mirrors, brush and tumbler holders, tub enclosures and shower doors and glass shelves.

All piping for pneumatic or vacuum cleaning systems.

All liquid soap piping, and tanks, valves, and equipment in connection therewith.

All hydraulic piping in service stations and garages.

All gasoline and liquid fuel systems in filling stations and garages shall be the work of the plumber.

All fuel piping for gasoline or other liquid fuels in large manufacturing plants, airfields, etc. whether pressure system or floatation system and all cleaning solvents piping in cleaning shops, dye shops, and laundries shall be the work of the plumber.

All fire extinguishing systems whether by gas, water or chemicals, and all piping in connection therewith.

The setting of all sleeves, inserts, hangers, supports, for all piping and equipment installed by the plumber.

The operation of all power equipment incident to fabrication installation, and testing of all work installed by the plumber including operation of pipe threading machines, lead-wiping machines, power cut off machines, power hacksaw's, portable or truck-mounted electric hoists, power hydrostatic test pumps, air compressors for test purposes, portable pumps (when used to pump out ditches, sumps, catch basins, etc.) as well as welding machines (whether gas or electric) when such tools are used exclusively by the employees covered by this Agreement.

Rigging and signaling by whatever device or method.

The laying out and cutting of all holes, chases and channels for all piping and equipment installed by the plumber.

All work that is plumbing work as set forth in Article II 'Scope' of the Agreement shall be performed by employees covered by this Agreement, either on job site or in shop of Employer, and all fabrication and prefabrication, including making of flashings and

fabrication of leads stubs and traps, shall be assigned by Employer to his employees covered by this Agreement.

Unloading and distribution of all materials on job site and throughout the job.

The Respondent operates under the names of Shade Tree Electric d/b/a Ace Electric and Plumbing, Inc. and Shade Tree Electric of Arkansas, Inc. The complaint alleges and General Counsel contends that they constitute a single employer under the Act. The facts in this case are largely undisputed with respect to the operation of Respondent. Respondent, Ace and Respondent Shade Tree are Texas corporations engaged in the business of providing plumbing services for new commercial construction with their offices and places of business in Greenville, Texas. In the 12-months prior to the issuance of the complaint, Respondent performed services valued in excess of \$50,000 for Wal-Mart, an entity directly engaged in interstate commerce. The record in this case discloses that at all material times Noreen Vanover has held the position of President, Bradley Vanover, her son, has held the position of Vice President and Ray Lee Wilcox has held the position of Secretary of Shade Tree and each of these individuals has been a supervisor within the meaning of Section 2(11) of the Act and an agent within the meaning of Section 2(13) of the Act. Gene Vanover, the husband of Noreen and the father of Bradley appeared and testified in answer to the General Counsel's subpoena and acted as representative for the Respondent at the hearing. Although Vanover initially testified that he holds no position with Respondent, it is apparent from the record that he is a supervisor and agent of Respondent who was president of Respondent until 1995 and was a 100 percent owner of Respondent, that his wife retains a 50 percent interest and that in conjunction with Ray Lee Wilcox, he sets employees' wages. In 2002, he signed contracts in evidence with the Union as either "President" or "Owner" including the collective-bargaining agreement.

Essentially what occurred in this case was that Gene Vanover contacted the Union and asked it to refer plumbers to him. He was informed by the Union representative that he would need to sign a labor agreement and post a bond and did so, signing the labor agreement which expires by its terms on September 2003. He was questioned by a Union official as to whether the request was only for the one job and said that he was bidding on other jobs within the Union's jurisdiction and would call for more plumbers as needed on other jobs. According to Vanover several of the employees referred to him by the Union on this job (the Wal-Mart in Pearland, Texas) were unsatisfactory. Union officials testified that they sent two of the unsatisfactory employees back to the hall and furnished substitutes for the job within a day and a half. According to Vanover's testimony he did not read the contracts he signed and only believed he was agreeing to operate under the labor agreement and use their hiring hall for referrals for this one job. Consequently he commenced work on other projects and did not utilize the Union hall to obtain plumbers. His asserted reasons for doing so were that he was dissatisfied with the employees referred by the Union and that the payment of the Union rates of pay and benefits greatly increased the costs of the job.

Organizer Calvin Speight testified that in June 2002, Ace Electric's President Eugene Vanover called the Union hall and discussed signing a contract. Vanover told him he was having difficulty hiring plumbers. Vanover told Speight that another organizer, Jeffrey LaBroski had given him a copy of the contract. Vanover told Speight he needed plumbers for a Wal-Mart job in Pearland, Texas, beginning June 24, 2002. Speight testified that the Union would be able to send plumbers for the job but that he told Vanover that he needed to sign the Union contract and post a bond first. Speight asked Vanover if he only intended to use the Union for this one job. Vanover replied, "No" that he was bidding on other jobs in the Houston area as well. Vanover signed the contract and faxed a copy of the signature page to the Union. As of June 20, 2002, the contract had been executed by both parties. In accordance with the contract plumbers were referred by the Union to Respondent for the Wal-Mart job at Pearland, Texas, commencing in June 2002, and running through December 2002. Respondent paid the wages and all the fringe benefits in accordance with the contract.

Subsequently, Speight heard around February 2003, that Respondent was working on other jobs, including a Wal-Mart construction job in Humble, Texas. Speight and organizer LaBroski went to the job and spoke with Ray Wilcox and Speight reminded Wilcox who was in charge of the job that Respondent had a contract with the Union and asked if Respondent intended to use their labor. Wilcox said he would have Vanover call Speight. However, after he did not hear from Vanover, Speight began calling in February and March 2003, for Gene Vanover and was repeatedly told he was unavailable. In later March, Speight called Wilcox and told him that Vanover had failed to return his calls. At that point Wilcox told him that the Respondent did not need the Union. On April 21, 2003, Union Representative Speight sent a letter to Vanover informing him he was in material breach of the contract. About May 20, 2003, Speight received a voice mail message from Vanover stating he did not intend to use the Union for everything, but only for the one job. The message also stated that Respondent did not have enough money in its jobs to pay union scale. As of the date of the hearing in this case Respondent was currently working on three jobs in the Houston area, one Wal-Mart Store and two HEB Stores. The Respondent had not hired employees through the Union or paid the contractual wages or fringe benefits for any job other than the Pearland Wal-Mart job.

As General Counsel notes, in her memorandum, numerous company names were discussed in Vanover's testimony. He testified that Ace Electric and Plumbing and Shade Tree Electric were "one and the same" company and the Company was usually labeled "Shade Tree d/b/a Ace Electric and Plumbing, Inc." Vanover testified that his wife Noreen Vanover holds a 50 percent interest in the Company and Wilcox holds the other 50 percent. He also testified that Shade Tree Electric of Arkansas, Inc. is a Texas corporation which also provides construction services for new commercial construction. Wilcox is its vice president. There was also an entity described as "B & R Contractors d/b/a Ace Electric" on an insurance liability certification. This was in reference to his son Bradley and Roy Wilcox but he testified there is no such entity. In sum, all of the company names discussed at the hearing were one and the same company. Vanover testified they all share common offices, ownership, directors, supervisors, labor relations policies, equipment and office space. General Counsel's Exhibit 10 contains the

Company payroll including the Tomball HEB job which was performed under the name of Shade Tree of Arkansas. The payroll also establishes that employees performed work for Respondent under various company names.

Analysis

The evidence leaves no doubt that Ace and Shade Tree is a single employer as there is interrelationship of operations, common management, centralized control of labor relations and common ownership and financial control. See *RBE Electronics of S.D.*, 320 NLRB 80 (1995); *Vallery Electric, Inc. v. NLRB*, 336 NLRB 1272 (2001) enfd. 2003 W L 21500169 (2003). The Company performs the same work for the same customers and Vanover bids for all of them. The shareholders are identical and the officers are overlapping. See also *I.C.E. Electric, Inc.*, 339 NLRB No. 36 (2003).

The labor agreement by which Respondent recognized the Union for the terms of the agreement until it expires on September 30, 2003, clearly binds the parties to the wage scale and fringe benefits spelled out in the agreement. I credit Speight's version of the conversation between himself and Gene Vanover rather than Vanover's assertions that he had only agreed to follow the terms of the contract for the Wal-Mart job in Pearland, Texas. Initially the agreement is clear and unambiguous and Vanover signed it on behalf of Respondent. I agree with General Counsel's position that under the parole evidence rule, evidence of any contrary oral understanding will not be credited. *Scapino Steel Erectors, Inc.*, 337 NLRB No. 158 (2002). Moreover, I credit Speight's testimony over that of Vanover's and find that Vanover did not limit his acceptance of the contract to one job as he contends. I find it more likely that Vanover signed the agreement under the pressure of his need for plumbers the following Monday, and later reconsidered his decision to recognize the Union. However, at this stage he was bound by the contract until it expires on September 30, 2003, under *John Deklewa & Sons, Inc.*, 282 NLRB 1375 (1987), which upholds the rights of the Union and an employer in the construction industry to enter into a contract under Section 8(f) of the Act whereby the Employer agrees to recognize the Union although there has been no showing that the Union has been recognized to represent the employees in the particular bargaining unit involved. In the instant case there is no evidence of any misrepresentation by the Union agents. This agreement is enforceable as an 8(f) contract. General Counsel's motion to preclude the Respondent from cross-examining its witnesses with respect to subpoena issues is denied.

I thus find that by its repudiation of the contract and its withdrawal of recognition from the Union, the Respondent violated Section 8(a)(5) and (1) of the Act.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By repudiating its collective-bargaining agreement with the Union and withdrawing recognition from the Union prior to the expiration of the collective-bargaining agreement, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, it shall be ordered that the Respondent cease and desist and to take certain affirmative actions designed to effectuate the policies of the Act. Respondent shall make whole, as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), any employees for losses they may have suffered as a result of Respondent's failure to adhere to the contract, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987) at the "short term Federal rate" for underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. Section 6621.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:¹

ORDER

The Respondent, Ace Electric and Plumbing, Inc., and Shade Tree Electric of Arkansas, Inc., a single Employer, its officers, agents, successors and assigns shall

1. Cease and desist from:

(a) Withdrawing recognition during the term of a collective-bargaining agreement.

(b) Refusing to adhere to, until the September 30, 2003 expiration date, its 2002-2003 collective-bargaining agreement with the Union.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Make whole the above described employees in the manner set forth in the remedy, for any losses they may have suffered as a result of the Respondent's failure to adhere to the contract until it expires on September 30, 2003.

¹ If no exceptions are filed as provided by §102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Preserve and, within 14 days of a request, make available to the Board or its agents, for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post copies of the attached notice marked “Appendix.”² Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other representative shall be material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 20, 2002.

Dated, Washington, D.C.

Lawrence W. Cullen
Administrative Law Judge

² If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading “POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD” shall read “POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.”

APPENDIX

NOTICE TO EMPLOYEES

**Posted by the Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

**Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities**

WE WILL NOT during the term of a collective-bargaining agreement, repudiate that agreement and withdraw recognition from, Plumbers Local Union No. 68, AFL-CIO a/w United Association of Journeyman and Apprentices of the Plumbing and Pipefitting Industry of the U.S. and Canada, AFL-CIO as the exclusive collective bargaining representative of our employees covered by the agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL make our employees whole for any losses they may have suffered as a result of our failure to adhere to the 2002-2003 contract with the Union until it expires on September 30, 2003.

**ACE ELECTRIC AND PLUMBING,
INC., AND SHADE TREE ELECTRIC
OF ARKANSAS, INC., A SINGLE
EMPLOYER**

(Employer)

Dated: _____

**By: _____
(Representative) (Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may

Speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information for the Board's website: www.nlr.gov.

**819 Taylor Street, Room 8A24, Fort Worth, TX 76102-6178
(817) 978-2921, Hours: 8: a.m. to 4: 30 p.m.**

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE. THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S

COMPLIANCE OFFICER, (817) 978-2925